IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

KEITH WARD, WILLIAM CLARK, KODY CLARK, ED JOHNSTON, and All Others Similarly Situated, Plaintiffs v. WIND RIVER TRUCKING, LLC d/b/a WIND RIVER OIL SERVICES; and TODD BRADFORD, Defendants	§ § § § § § § § § § § §	CIVIL ACTION NO. 1:16-cv-418 **COLLECTIVE AND CLASS ACTION** **JURY TRIAL DEMANDED**

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS AND MOTION FOR LEAVE TO AMEND COMPLAINT

TO THE HONORABLE UNITED STATES DISTRICT COURT:

Plaintiffs, KEITH WARD, WILLIAM CLARK, KODY CLARK, ED JOHNSTON, and All Others Similarly Situated ("Plaintiffs"), files this PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS, and respectfully requests that the court deny Defendant's Motion to Dismiss, and for cause would show the following:

I. SUMMARY OF RESPONSE

1. Defendants Wind River Trucking, LLC d/b/a Wind River Oil Services ("Wind River") and Todd Bradford ("Mr. Bradford") ask this Court to dismiss Plaintiffs action pursuant to the "first-to-file" rule and under FED. R. CIV. P. 12(b)(6) for failure to articulate a claim against Mr. Bradford. The Court should deny Defendants' Motion on both grounds.

2. The first-to-file rule is not applicable to this action. The first-to-file rule states that the court which first obtains jurisdiction over a matter has the continuing right to hear that matter. However, the Utah court has not properly gained jurisdiction over the North Dakota Plaintiffs have

no interest in the outcome of the pending Utah litigation, and therefore, dismissal of this action would severely jeopardize the North Dakota plaintiffs' rights.

3. Plaintiffs have sufficiently pled claims against supervisor Thomas Bradford as evidence based on the Original Complaint. However, should this honorable Court decide that such pleadings lack factual support, Plaintiff requests that the Court grant Plaintiffs' Motion for Leave to Amend the Pleadings in the interest of justice.

II.
ARGUMENTS & AUTHORITIES

A. RULE 12(B)(6) AND RULE 8(A)

5. Dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) is not appropriate unless the complaining party fails to state a claim upon which relief can be granted. Rule 12 (b)(6) motions are disfavored and rarely granted. For a pleading to state a claim for relief it must contain a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). The complaint must contain facts sufficient to state a claim that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

6. In reviewing a dismissal under Rule 12(b)(6), this court is not limited to the allegations in the complaint, but may also consider "materials that do not contradict the complaint, or materials that are necessarily embraced by the pleadings." *Noble Sys. Corp. v. Alorica Cent., LLC*, 543 F.3d 978, 982 (8th Cir. 2008) (citation omitted) (internal quotation marks omitted).

7. In ruling on a Rule 12(b)(6) motion to dismiss, the court must construe the complaint in favor of the plaintiff, taking all facts pleaded as true, no matter how improbable those facts. *Neitzke v. Williams*, 490 U.S. 319, 327 (1989). A complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 (U.S. 1957); *May v. Commissioner of Internal Revenue*, 752 F.2d 1301, 1303 (8th Cir. 1985); *Fusco v. Xerox Corp.*, 676 F.2d 332, 334 (8th Cir. 1982).

8. The allegations of plaintiffs' complaint must be assumed to be true, and further, must be construed in their favor. *Scheuer v. Rhodes*, 416 U.S. 232, 236, (U.S. 1974); *Wright v. Anthony*, 733 F.2d 575, 577 (8th Cir. 1984). The issue is not whether plaintiffs will ultimately prevail, but rather whether they are entitled to offer evidence in support of their claims. *Scheuer*, 416 U.S. at 236. Therefore, only in the “unusual case" where the complaint on its face reveals some insuperable bar to relief that a dismissal under Rule 12(b)(6) is dismissal warranted. *Fusco*, 676 F.2d at 334 (and authorities cited therein); *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1376, (8th Cir. Iowa 1989).

B. THE FIRST-TO-FILE RULE DOES NOT PROHIBIT THE INSTANT ACTION FROM MOVING FORWARD

9. The first-to-file rule (also referred to as the first filed rule) stands for the proposition that the first court to obtain jurisdiction over a matter has priority to hear the case. *Northwest Airlines v. American Airlines*, 989 F.2d 1002, 1006 (8th Cir. Minn. 1993). *Orthmann v. Apple River Campground Inc.*, 765 F.2d 119, 121 (8th Cir. 1985). In *Northwest Airlines*, the 8th Circuit explained that the first-to-file rule is used "to conserve judicial resources and avoid conflicting rulings, the first-filed rule gives priority, for purposes of choosing among possible venues when parallel litigation has been instituted in separate courts, to the party who first establishes

jurisdiction." *Northwest Airlines*, 989 F.2d 1002, 1003. However, the rule "is not intended to be rigid, mechanical, or inflexible," but is rather to be applied in a manner best serving the interests of justice. *Orthmann*, 765 F.2d at 121.

10. Defendants cite *Northwest* as an authority to apply the first filed rule to the instant case. However, unlike the facts presented in the instant case, *Northwest* did not apply the first-to-file rule in the context of an FLSA action, but rather to the issuance of an injunction seeking a stay on related litigation pending in two different states. Notwithstanding, Defendant has identified some courts that have applied the first-to-file rule to overlapping wage and hour collective actions and dismiss later-filed FLSA collective actions where the later-filed lawsuit is identical or nearly identical to the first. (as cited by Defendants) *See, e.g.*, *Ortiz*, 2011 WL 3353432 at *2; *Fisher v. Rite Aid Corp. & Eckerd Corp.*, 2010 WL 2332101 at *2-3 (D. Md. June 8, 2010); *Walker v. Progressive Cas. Ins. Co.*, 2003 WL 21056704 at *2-3 (W.D. Wash. May 9, 2003); *White v. Peco Foods, Inc.*, 546 F.Supp.2d 339, 342-43 (S.D.Miss.2008); *Steavens v. Elec. Data Sys. Corp.*, 2008 WL 5062847 at *1-3 (E.D. Mich. Nov. 25, 2008); *Fuller v. Abercrombie & Fitch Stores, Inc.*, 370 F.Supp.2d 686, 688-690 (E.D. Tenn. 2005); *Goldsby v. Ash*, 2010 WL 1658703 at *3-4 (M.D. Ala. Apr. 22, 2010).

11. However, the litany of first-to-file cases cited by Defendant are not binding on this court, and are merely persuasive at best. Further, unlike the Utah and North Dakota actions at issue, all of these persuasive cases cited by the Defendants involve claims asserted against the same employer in both first-filed action and second-filed action that is the subject of dismissal. *Ortiz*, 2011 WL 3353432 at *2 (first-to-file and second-to-file plaintiffs brought same or similar claims against Panera for FLSA overtime claim); *Fisher v. Rite Aid Corp. & Eckerd Corp.*, 2010 WL 2332101 at *2-3 (D. Md. June 8, 2010)(first-filed and second-filed brought same claims

against both Rite Aid Corporation & Eckered Corp); *Walker v. Progressive Cas. Ins. Co.*, 2003 WL 21056704 at *2-3 (W.D. Wash. May 9, 2003)(first-filed and second-filed plaintiffs brought same or similar claims against Progressive insurance); *White v. Peco Foods, Inc.*, 546 F.Supp.2d 339, 342-43 (S.D.Miss.2008) (first-filed and second-filed plaintiffs brought same or similar claims against the same employer defendant); *Steavens v. Elec. Data Sys. Corp.*, 2008 WL 5062847 at *1-3 (E.D. Mich. Nov. 25, 2008); *Fuller v. Abercrombie & Fitch Stores, Inc.*, 370 F.Supp.2d 686, 688-690 (E.D. Tenn. 2005) (all potential plaintiffs filing claims against single employer Abercrombie & Fitch).

12. *Goldsby v. Ash*, is the single case cited by Defendants where first and second-filed cases named different defendants, yet were held to be "substantially similar" under the first-to file rule. 2010 WL 1658703 at *3-4 (M.D. Ala. Apr. 22, 2010). *Goldsby v. Ash* is not analogous to this case. In *Goldsby*, Goldsby, the first-filed plaintiff filed suit against employer Renosol in the Sothern District of Alabama alleging FLSA violations for unpaid wages on behalf of herself and others similarly situated. *Id.* at *9-10. Goldsby then filed suit in the Middle District of Alabama on behalf of herself and those similarly situated against individual current and former Renosol supervisors for claims identical to those asserted against Renosol in the first-filed action. *Id.* The fact that Goldsby named two different defendants in the actions was of little consequence considering the supervisors named in the second-filed action were still being sued in their capacity as Rensonol employees, and were effectively substantially similar. *Id.* Thus, under the first-to-file rule, the court transferred second-filed case to the Southern District of Alabama. Unlike *Goldsby*, the Defendants in the Utah action and the North Dakota action are not substantially similar. The Utah plaintiffs bring claims against employers that the North Dakota plaintiffs have never been employed by. The present circumstances are different than those in *Goldsby*. Had the different

named defendants been related to the same company, that would be analogous to *Goldsby*, and the *Goldsby* case would be persuasively supportive of Defendants argument that the two cases at issue are substantially similar. However, in the Utah action, Plaintiffs bring claims against defendants that have no relation whatsoever to the North Dakota Plaintiffs. The parties and claims involved in the two actions are not as substantially similar as Defendants claim.

13. Most importantly, the instant action should not be dismissed because Plaintiffs are not adequately represented by the Utah plaintiffs and class-members. FLSA collective actions cover only the individuals who affirmatively elect to join. 29 U.S.C. § 216(b). “Unlike in a Rule 23 class action, in a FLSA collective action the plaintiff represents only him–or herself until similarly-situated employees opt in.” *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 919 (5th Cir. 2008). As a result, “the named plaintiff in a section 216(b) action under the FLSA has no procedural right to represent other plaintiffs [.]” Id. at 918 (quoting *Vogel v. Am. Kiosk Mgmt.*, 371 F.Supp.2d 122, 127 (D.Conn.2005)).

14. Plaintiffs in the instant action “have no interest whatsoever in the outcome” of the Utah conditionally certified FLSA case. *Altier v. Worley Catastrophe Response*, LLC, No. CIV.A. 11-241, 2012 WL 161824, at *11 (E.D. La. Jan. 18, 2012). The North Dakota Plaintiffs have chosen to pursue their own rights, and the rights of those similarly situated, here, in the present matter. Because the North Dakota Plaintiffs chose not to join the Utah action, they will not be bound by the outcome of the Utah litigation. *See Doe v. Cin- Lan, Inc.*, No. 08-CV-12719, 2011 WL 37970, at *2 (E.D. Mich. Jan. 5, 2011). Considering that the North Dakota Plaintiffs in this action have no interest, let alone a “direct, substantial, and legally protectable” one, in the Utah action, proceeding with this action is absolutely necessary to protect the North Dakota Plaintiffs’ rights. *Altier*, 2012 WL 161824, at *11.

15. The Utah Plaintiffs agree with the above assertion. The North Dakota Plaintiffs had filed a Motion for Limited Intervention to Object to Conditional Certification in the Utah action, to which the Utah plaintiffs filed their Plaintiff's Opposition (attached hereto as Exhibit A and Exhibit B, respectively). In their opposition, the Utah Plaintiffs argued that the North Dakota Plaintiffs had no standing to intervene in the case because the North Dakota had no legally protectable right in the Utah action. (*Exhibit B,* page 8-9). Considering that the instant Plaintiffs, do not have a legally protectable interest in the Utah action, and would not be bound by the outcome of the Utah litigation, the North Dakota Plaintiffs withdrew their Motion for Limited Intervention (attached hereto as Exhibit C), and proceeded with this action in pursuit of their own rights.

E. PLAINTIFF'S COMPLAINT STATES CLAIMS UPON WHICH RELIEF CAN BE GRANTED

16. Taking *all facts pled by the Plaintiff to be true*, Plaintiff has asserted claims which would entitle them to relief.

ii. Violation of the FLSA

a. As to Defendant Thomas Bradford

17. Plaintiffs' claims against supervisor Thomas Bradford are well-plead. By their allegations in their Brief in Support of Motion to Dismiss, Defendants attempt to impose a heightened pleading standard on Plaintiffs. The FLSA requires covered employers to compensate non-exempt employees at overtime rates for time worked in excess of statutorily-defined maximum hours. 29 U.S.C. S. § 207(a). A covered employer is defined under Section 203(d) of the FLSA, as any person acting directly or indirectly in the interest of an employer in relation to an employee. 29 U.S.C. § 203(d). The FLSA definition is broad and, courts may apply the 'economic reality' test in conjunction with Section 203(d) to determine whether or not an individual is considered an employer for purposes of the FLSA. *See Ash v. Anderson*

Merchandisers, LLC, 799 F.3d 957, 961, (8th Cir. Mo. 2015). The 'economic reality' test is a four-part analysis of the alleged employer's "interest" in the claimant employees' job duties. *See Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999). The four points of the test are: (1) the power to hire and fire the employees; (2) the power to supervise and control the employees' work schedules or conditions of employment; (3) the power to determine the rate and method of the plaintiff-employees' compensation; and (4) the maintenance of employment records. *Id.* The "economic reality" factors are not exclusive, and do not all need to weigh in favor of a finding of employment in order for an individual to be held liable under the FLSA. *Tracy v. NVR, Inc.*, 667 F. Supp. 2d 244, 247 (W.D.N.Y. 2009).

18. A conclusory allegation is insufficient to satisfy Rule 12(b)(6) pleading requirement. *Ash*, 799 F.3d at 961 (8th Cir. Mo. 2015). Facts such as the identity of supervisors, the creator of work schedules, and any relevant information given to the employee at the time of hiring, are all types of factual evidence that could "allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Iqbal*, 556 U.S. at 678).

19. While this court has not specifically addressed individual liability under the FLSA, it has operated under the implicit assumption that individual employer liability does exist for FLSA claims. *Darby v. Bratch*, 287 F.3d 673, 681, (8th Cir. Mo. 2002); *Rockney v. Blohorn*, 877 F.2d 637 (8th Cir. 1989).

20. Defendants point to *Tracy v. NVR*, in support of their motion to dismiss Plaintiff's claims against Thomas Bradford, individually. In *Tracy*, the plaintiffs made an FLSA claim for unpaid overtime wages against the director of human resources James Madigan. *Id*. at 246. The pleadings in Tracy established that upon the plaintiffs' "*information and belief*" Madigan had the authority to hire and fire employees, and maintained employee records. *Id.* at 247. The pleadings

provided no further substantive details regarding Madigan's job duties to support liability. *Id.* Plaintiffs asserted only that Madigan's exercise of his supposed policy-setting powers as the Director of Human Resources supported, or indirectly impacted, the areas of employment related encompassing the 'economic test' factors. *Id.* Aside from Madigan's job-title, plaintiffs did not provide any facts that showed Madigan in fact had the level of control plaintiffs asserted. I*d.*

21. Unlike the plaintiffs in *Tracy*, Plaintiffs in the instant action have pled more than just conclusory statements concerning Defendant Bradford's involvement in the company-wide plan or policy they complain of. Plaintiffs' First Amended Complaint (attached hereto as Exhibit D) establishes the following (1) Mr. Bradford is the President of Wind River Trucking, LLC and actively manages Wind River's operations. (*Exhibit D* Page 4); (2) Defendant Bradford paid plaintiffs and class-members hourly, at a flat-day-rate base (*Exhibit D* Page 5); (3) Defendant Bradford did not pay Plaintiffs overtime compensation during the relevant time period (*Exhibit D* Page 5); and (5) Defendant Bradford's method of paying Plaintiffs is in violation of the FLSA and North Dakota Law (*Exhibit D*, Page 5). The factual statements contained in Plaintiff's First Amended complaint surpass the threshold for a well-pled complaint, and Defendant's Motion to Dismiss for Failure to State a Claim (Fed. R. 12 (b) (6)) as to Defendant Bradford should be dismissed.

C. Violation of North Dakota Wage and Hour Laws

ii. As to Defendant Thomas Bradford

22. North Dakota's laws regarding the payment of wages, including overtime, generally parallel the provisions of the FLSA. Accordingly, Plaintiffs have met their pleading burden under the FLSA and North Dakota's wage statutes.

D. PLAINTIFF'S MOTION FOR LEAVE

23. In the alternative, to the extent this Court may find that any claim is not sufficiently pled under the Federal Rules of Civil Procedure, do not conform to the Rules or are deficient, Plaintiff respectfully requests leave to amend its Complaint.

24. The Federal Rules of Civil Procedure provide that amendment of pleadings is to be liberally permitted: A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed on the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of Court or by written consent of the adverse party; and leave shall be freely given when justice so requires. Fed. R. Civ. P. 15(a) (emphasis added). *See, e.g., Foman v. Davis*, 371 U.S. 178, 179(U.S. 1962) (Rule 15(a) mandates that leave to amend be freely given when justice requires, giving plaintiff an opportunity to test claims on the merits); *Sanders v. Clemco Industries*, 823 F.2d 214 (8th Cir. Mo. 1987).

25. Only limited circumstances justify a district court's refusal to grant leave to amend pleadings: undue delay, bad faith on the part of the moving party, futility of the amendment or unfair prejudice to the opposing party. *Foman*, 371 U.S. at 182. No circumstance is present which would warrant the denial of Plaintiff's Motion for Leave.

III.
PRAYER

26. For the foregoing reasons, Plaintiffs KEITH WARD, WILLIAM CLARK, KODY CLARK, ED JOHNSTON, and All Others Similarly Situated ("Plaintiffs"), respectfully request that this Court deny Defendants' Motion to Dismiss; or in the alternative, Plaintiff respectfully requests that this Court grant Plaintiff's Motion for Leave to Amend Complaint so that Plaintiff

may amend the pleadings in the interest of justice; and such other relief at law or in equity to which Plaintiffs may show themselves entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2017, a true and correct copy of the foregoing **PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS AND MOTION FOR LEAVE TO AMEND COMPLAINT** was filed electronically with the Clerk of Court through ECF, and that ECF will send a Notice of Electronic Filing (NEF) to the following persons:

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